

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2006

STATE OF TENNESSEE v. DEMETRIUS HOLMES

Direct Appeal from the Criminal Court for Knox County
No. 67734 Richard R. Baumgartner, Judge

No. E2006-00393-CCA-R3-CD - Filed December 14, 2006

The defendant, Demetrius Holmes, was convicted of facilitation of aggravated robbery and sentenced to six years in the Tennessee Department of Correction as a standard offender. On appeal, he challenges the length of the sentence imposed by the trial court. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

J. Liddell Kirk (on appeal) and Bruce E. Poston (at trial), Knoxville, Tennessee, for the appellant, Demetrius Holmes.

Paul G. Summers, Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Ta Kisha M. Fitzgerald and Del Holley, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

Procedural Background

On March 25, 1999, the defendant was indicted for aggravated robbery. A trial was conducted at some point during 1999 or 2000, and a Knox County jury convicted the defendant as charged. On appeal, this court reversed the judgment of the trial court and remanded the case for a

new trial.¹ *State v. Demetrius Holmes*, No. E2000-02263-CCA-R3-CD, 2001 WL 1538517 (Tenn. Crim. App., at Knoxville, Nov. 30, 2001). On September 13, 2005, after the defendant's new trial, a Knox County jury convicted the defendant of the lesser-included offense of facilitation of aggravated robbery. Following a sentencing hearing, the trial court sentenced the defendant to six years in the Tennessee Department of Correction ("TDOC") as a standard offender.² The defendant then filed a motion for new trial and a hearing was set for January 26, 2006. On that day, a comprehensive plea agreement was announced disposing of other outstanding cases against the defendant. As part of that plea agreement, the defendant agreed to only appeal the sentence in the present case, not the verdict. The defendant filed a timely notice of appeal.

Factual Background

The underlying facts giving rise to the defendant's conviction are as follows. On July 28, 1998, at approximately 1:00 p.m., the defendant rang the doorbell of Sam Love, Jr.'s house, and Kathy Williams, Love's girlfriend, told Love that a man she did not know was at the door. Love went to the door and the defendant asked him the names and addresses of some people whom Love was not familiar. Love partially opened the security door to lean out and address the defendant, and the defendant pulled out a gun, put the gun in Love's face, and entered the house.

Love attempted to grab the gun from the defendant and the defendant was about to lose his grip when the defendant yelled for help. In response to the defendant's call, an accomplice came in behind Love, took the gun from the defendant, ordered Love to lay on the floor, and put the gun to Love's head. The defendant's accomplice told Love to give him money and Love complied because "[t]he money didn't mean what [his] life [meant]." The defendant and his accomplice told Love not to move and they ran out the door. Once the defendant and his accomplice were gone, Love ran outside and a neighbor called 911. Shortly after, law enforcement arrived at the scene, and the next day, Love and Williams identified the defendant out of a photographic array.

According to the defendant, he did not rob Love, nor did he scare Williams, but he knew who did. The defendant stated that on July 28, 1998, he was with a friend, Misty Moore, at a motel and stayed in the motel room the entirety of July 28, 1998, except when he walked across the street to McDonald's Restaurant. The next day, the defendant and Moore checked out of the motel and Moore took the defendant home. Moore was driving the defendant around because the defendant had loaned his mother's black Jeep to Michael Tumlin.³ Tumlin called the defendant the afternoon of July 28th, and as a result of that conversation, the defendant called his mother and told her to report that her Jeep was stolen even though he knew it had not been stolen.

¹ The reversal was based on the trial court's failure to grant a mistrial after a detective testified that the defendant was well-known for home invasions.

² Interestingly, the defendant had already served his sentence at the time of sentencing.

³ Apparently, the robber was seen leaving the scene in a black Jeep.

Sentencing Hearing

At the December 1, 2005, sentencing hearing, the defendant agreed that he had been convicted of a couple of weapons offenses and escape as an adult, and aggravated assault as a juvenile. The court noted that the defendant was a standard offender. In addressing enhancement factors, the court found enhancement factor (1) applicable in that the defendant had prior criminal convictions in addition to those necessary to establish him as a standard offender. *See* Tenn. Code Ann. § 40-35-114(1). The court declined to apply enhancement factor (2), finding there was no proof in the record to establish that the defendant was a leader in the commission of the offense. *See id.* § 40-35-114(2). The court found enhancement factor (8) applicable in that the defendant was arrested on new charges while released on bond. *See id.* § 40-35-114(8). Although mistakenly referring to it as factor (21), the court found enhancement factor (16) applicable based on the defendant's conviction for aggravated assault as a juvenile. *See id.* § 40-35-114(16).

Regarding mitigating factors, the defendant requested that the court apply factor (4), that he played a minor role in the commission of the offense. *See id.* § 40-35-113(4). The defendant argued this factor based on his belief that the jury convicted him of the lesser-included offense of facilitation because of his allegedly loaning his Jeep to Michael Tumlin and his insinuation that Tumlin committed the robbery. The trial court rejected the defendant's argument, finding that he was speculating as to the jury's reasoning in finding him guilty of facilitation, and that there was no evidence to establish that he played a minor role in the offense.

The trial court sentenced the defendant to six years in the TDOC, noting that:

based on the fact that there are three enhancing factors and no mitigating factors that . . . apply . . . start[ing] at the bottom of the range, which is three years, increas[ing] for any enhancement factors, and then reduc[ing] for any mitigating factors. . . . [T]aking everything into account about this case, the testimony at trial, the presentence report, [the defendant's] record, [and] the principles of the Sentencing Act. . . .

II. ANALYSIS

On appeal, the defendant challenges the trial court's imposition of a six-year sentence, the maximum sentence for a Range I offender convicted of a Class C felony. Specifically, he asserts that because he had a short criminal history of non-felony offenses and because this robbery was "no particularly worse than any other robbery," the maximum possible sentence was not justified. He also asserts that the trial court should have applied as a mitigating factor that he played a minor role in the offense.

When an accused challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the

affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reveals that the trial court complied with the purposes and procedures of the 1989 Sentencing Act and its findings are supported by the record, this court cannot disturb the sentence even if we would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

As a Range I offender convicted of facilitation of aggravated robbery, a Class C felony, the defendant was subject to a potential sentence of three to six years. *Id.* §§ 39-11-403, 39-13-402, 40-35-112(a)(3). Starting with the minimum in the range, the trial court should adjust the sentence length within the range as appropriate based upon the presence or absence of mitigating and enhancement factors set out in sections 40-35-113 and 40-35-114. *Id.* § 40-35-210(c). The weight to be afforded an existing factor is left to the trial court's discretion so long as the court complies with the statutory sentencing guidelines and its findings are adequately supported by the record. *See State v. Souder*, 105 S.W.3d 602, 606 (Tenn. Crim. App. 2002).

Initially, we are constrained to note that the defendant failed to ensure that the presentence report was included in the record on appeal. It appears that the presentence report was not formally introduced into evidence at the sentencing hearing, even though it is clear that the trial court relied on it to some extent in sentencing the defendant. It is the duty of the defendant to prepare a fair, accurate, and complete record on appeal to enable meaningful appellate review. Tenn. R. App. P. 24(a). The presentence report is a necessary part of this court's review, and without it, we must presume that the trial court's determinations were adequately supported by the evidence. *See, e.g., State v. Meeks*, 779 S.W.2d 394, 397 (Tenn. Crim. App. 1988); *State v. Beech*, 744 S.W.2d 585, 588 (Tenn. Crim. App. 1987). In any event, the record before us supports the sentence imposed by the trial court.

After careful review, we first note that the record does not support the application of enhancement factor (8), the defendant's failure to comply with the conditions of a sentence involving release in the community. *See* Tenn. Code Ann. § 40-35-114(8). It appears that the trial court applied this factor based on the defendant getting arrested on new charges while out on bond. While the circumstances of this incident are not entirely clear due to the limited information before us, it

is our view that release on bond is not a *sentence* involving release into the community. *See State v. Clark Douglas Lively*, No. M2002-00666-CCA-R3-CD, 2002 WL 31757480, at *3 (Tenn. Crim. App., at Nashville, Dec. 6, 2002); *State v. Mark Allen Haskett*, No. E2001-00600-CCA-R3-CD, 2002 WL 31431498, at *11 (Tenn. Crim. App., at Knoxville, Oct. 31, 2002). Nevertheless, the trial court properly enhanced the defendant's sentence based on the defendant's criminal record and the defendant's commission of an offense as a juvenile that would be a felony if committed as an adult. *See* Tenn. Code Ann. § 40-35-114(1), (16). At the sentencing hearing, the trial court noted and defense counsel agreed, that the defendant had been convicted of a couple of weapons offenses and escape as an adult, and aggravated assault as a juvenile. Without the presentence report to verify this information, we presume the information is correct. Thus, the trial court could enhance the defendant's sentence based on the presence of these two enhancement factors.

We also conclude that the trial court properly acted within its discretion in declining to apply mitigating factor (4), that the defendant played a minor role in the commission of the offense. *See* Tenn. Code Ann. § 40-35-113(4). The defendant argues that because the jury found him guilty of facilitation instead of aggravated robbery, it must have believed his assertion that he loaned his vehicle to the person who actually committed the robbery while he was miles away at a motel. In regard to this factor, the trial court noted that there was no evidence to establish that the defendant played a minor role in the offense and he was only speculating as to the jury's reasoning in finding him guilty of facilitation. The trial court's decision is adequately supported by the record.

Despite the trial court's misapplication of enhancement factor (8), the sentence imposed is still appropriate. In *State v. Gomez*, our Supreme Court concluded that "[t]he Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors. . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." 163 S.W.3d 632, 661 (Tenn. 2005). Upon the finding of even one enhancement factor, "the statute affords to the judge discretion to choose an appropriate sentence anywhere within the statutory range." *Id.* at 659. Accordingly, based upon the presence of two enhancement factors and no mitigating factors, we conclude that the trial court did not err in sentencing the defendant to six years for his facilitation of aggravated robbery conviction.

III. CONCLUSION

After thorough review, we affirm the judgment of the Knox County Criminal Court.

J.C. McLIN, JUDGE